Supreme Court, U.S.
FILED
FEB 24 1995
OFFICE OF THE CLERK

No. 94-455

In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE, *Petitioners*

v.

HOUSTON JONES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
30 North LaSalle Street
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
MYLES R. HANSEN
GARY A. ORSEK
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 778-0616

**Counsel of Record*

QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 26 F.3d 727. The opinion of the district court (Pet. App. 4a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1994. The petition for a writ of certiorari was filed on September 12, 1994, and was granted on January 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT

Petitioners are law enforcement officers who were sued under 42 U.S.C. § 1983 for the allegedly excessive use of force. They sought summary judgment on qualified immunity grounds, asserting that their actions did not violate clearly established law because there was no evidence that their conduct was inconsistent with *any* legal standard. The district court denied the motion. The court of appeals then held that it lacked jurisdiction to entertain petitioners' interlocutory appeal. This holding is logically insupportable, threatens to frustrate the purposes of the qualified immunity doctrine, and cannot be reconciled with the consistent course of this Court's decisions applying the rule of finality. It should be set aside.

1. On November 6, 1990, John Heidelmeier, an officer of the Villa Park, Illinois, police department, responded to a report of an apparently intoxicated man in or near an intersection. When Heidelmeier arrived at the scene he found respondent beating his head or forehead against the door of a building. Although some subsequent facts are in dispute, it is clear that an altercation ensued and that Heidelmeier attempted to arrest and handcuff respondent. Four more Villa Park police officers (the three petitioners here and Genaro Esposito) soon arrived and assisted Heidelmeier in subduing respondent. Pet. App. 5a. After arriving at the police station respondent was treated for trauma and several broken ribs. *Ibid.*

Respondent subsequently was charged in state court with the criminal offenses of disorderly conduct, battery, and resisting arrest; he asserted as a defense that he lacked the

requisite mental state for the offenses charged because he was suffering an adverse insulin reaction at the time of his arrest. Pet. App. 6a. He testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed that he was being dragged up the stairs of the police station. The state trial court

> found that [respondent] came into contact, struck, and resisted a peace officer. Although the judge found [petitioners'] testimony credible and felt that all other elements of the charges against [respondent] had been proven, he concluded that the State had not proven beyond a reasonable doubt that [respondent] acted knowingly. The basis of the finding as to mental state was the testimony concerning [respondent's] diabetes and insulin shock.

Ibid.

Respondent then brought this 42 U.S.C. § 1983 action in the United States District Court for the Northern District of Illinois against petitioners, Heidelmeier, and Esposito. In relevant part, respondent alleged that the officers used excessive force against him and that they were responsible for an illegal arrest, false imprisonment, and malicious prosecution. The parties engaged in discovery during which the depositions of respondent and all of the defendants were taken. The officers stated in discovery that no one beat, struck or abused respondent during the arrest; the three petitioners also testified that their involvement with respondent ended after the arrest was effected and that they saw no one abuse respondent at the police station. Pet. App. 5a. Respondent, in contrast, while asserting that he had been beaten at the time of arrest and at the police station, testified that he was experiencing an insulin reaction when arrested and therefore "disclaim[ed] recollection of specific actions taken by defendants." *Id.* at 6a. He did deny resisting arrest

(*ibid.*) and said he recalled seeing Heidelmeier and Esposito while being beaten at the police station. *Ibid.*[1]

All of the defendants sought summary judgment, arguing as to the excessive force claim that there was absolutely no evidence that they had abused respondent; as for the false arrest and related claims, the defendants contended that the existence of probable cause for arrest established their qualified immunity from suit. The district court denied the motion. On the claim of excessive force, the court concluded that "[p]laintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed." Pet. App. 8a. The court also held that the false arrest claim should be tried, finding "there is at least some possibility plaintiff could prove lack of probable cause." *Id.* at 10a.

2. Petitioners (but not Heidelmeier and Esposito) filed an interlocutory appeal challenging the denial of summary judgment; as the court below explained, the appeal "assert[ed] the defense of official immunity." Pet. App. 1a. The court of appeals, however, dismissed the appeal as to the excessive force claim for lack of jurisdiction. The court noted that petitioners "are contending that they did not commit the acts of which plaintiff accuses them" and held that "[d]efendants do not deny that *if* they beat the plaintiff * * * then they lack immunity. *Whether* they beat the plaintiff is a question that

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[1] Respondent's doctor stated during discovery that respondent probably would have been weakened by an insulin reaction, but that in a small percentage of cases "a person undergoing an insulin reaction may show greater than normal strength." Pet. App. 6a. The motor deficit from the reaction would resemble that caused by intoxication. *Ibid.*

must be resolved in the district court before it may be reviewed on appeal." *Id.* at 2a (emphasis added). The court premised this holding on the conclusion that "[a] cry of 'we didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." *Id.* at 1a-2a.[2]

The court's holding in this case followed from its prior decision in *Elliott* v. *Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992), that "defendants may urge only legal issues" on interlocutory qualified immunity appeals. Pet. App. 1a. In *Elliott*, the court had reasoned that "the interlocutory appeal to vindicate the [qualified immunity] right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged." 937 F.2d at 341. The rule announced in *Elliott*, and applied in this case, therefore is that a defendant may appeal on grounds of qualified immunity only when he contends "that he acted in the shadow of legal uncertainty"; such an appeal is not cognizable in the Seventh Circuit when the defendant's argument is that he "had nothing to do with the events of which [the plaintiff] complains." *Id.* at 342. The court therefore remanded this case for trial.

SUMMARY OF ARGUMENT

1. The fundamental premise of the decision below — that immunity comes into play only when the defendant official maintains that the law under which he acted was unsettled — is manifestly wrong. Repeated decisions of this

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[2] The court did, however, reverse the district court's denial of summary judgment on the false arrest claim. It found from the undisputed evidence that probable cause to arrest existed and held that the district court erred in denying the motion on the ground that "the plaintiff might come up with more evidence before trial." Pet. App. 2a.

Court make clear that the immunity doctrine protects all officials who did not violate clearly established law, a group that necessarily includes defendants who did not violate the law *at all* because they did not commit the acts alleged or because those acts were lawful. The Court thus held in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), that a suit must be dismissed on immunity grounds when it fails to state a violation of law, and it made clear in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and *Anderson* v. *Creighton*, 483 U.S. 635 (1987), that immunity entitles the defendant to prevail when, after discovery, the plaintiff has failed to discover evidence that the defendant did what he was alleged in the complaint to have done.

Those decisions follow necessarily from the purpose of the immunity doctrine, which is designed to protect public officials from harassing and vexatious litigation that might inhibit discretionary action, discourage able people from government service, and distract officials from their duties. These policies, which have led the Court to hold generally that insubstantial suits against government officials should be terminated on immunity grounds at the earliest possible point, apply with full force to suits against officials who did nothing wrong. After all, a claim that has no legal or factual basis is at least as insubstantial (indeed, it seems considerably more so) than one in which the relevant law was unsettled.

2. The conclusion that petitioners have asserted an immunity defense resolves the question whether they have a right to interlocutory appeal under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under *Cohen*, appealability is determined for categories of claims. As a consequence, *Mitchell*'s holding that denials of qualified immunity are subject to interlocutory appeal is dispositive here.

In any event, it is plain that the claim here satisfies the elements of the test for appealability stated in *Cohen*.

Mitchell makes clear that the district court's order conclusively determines the disputed question and that the denial of immunity will be effectively unreviewable on appeal from the final judgment. And the interlocutory order here passes the final prong of the *Cohen* test, for the determination to be made on appeal is separable from the merits; the question whether there is a genuine issue of material fact (the issue for resolution on interlocutory appeal) surely is not identical to the question whether petitioners actually used excessive force against respondent (the issue for resolution at trial). This is particularly so because the Court tolerates a substantial overlap between the interlocutory appeal and the merits when, as in immunity cases, the right not to be tried is at stake.

3. The Seventh Circuit's rule relies on conceptual distinctions that are neither meaningful nor practically administrable. It is settled that an immunity claim must be resolved on the basis of what the defendant actually did, rather than what is alleged in the complaint; where the facts are disputed, on a summary judgment motion the court must determine (to the extent of deciding whether there are disputed issues of material fact) whose version of the facts to accept. Those facts then must be measured against the controlling law.

This means that in a case where there is no genuine issue of disputed fact regarding the defendant's account, the court will determine whether the conduct as described by the defendant violated clearly established law. There is no doubt that an appeal would lie if the legality of the defendant's conduct had been unclear, because the question then would be (in the Seventh Circuit's words) whether the defendant had "acted in the shadow of legal uncertainty." That being so, it makes no sense at all to deny the defendant an appeal because (as here) his conduct was clearly *legal*.

ARGUMENT

The law enforcement petitioners in this case moved for summary judgment, asserting that they were entitled to qualified immunity because the plaintiff failed to establish that their actions had violated clearly established law — or, indeed, that their actions had violated any law at all. The decision below that the denial of such a motion by the district court may not be challenged in an interlocutory appeal is insupportable. The Seventh Circuit's approach has been rejected by a substantial majority of the courts of appeals to address the issue,[3] and for good reason: it frustrates the purposes of the qualified immunity doctrine by permitting the trial of insubstantial suits, departs from this Court's precedents regarding interlocutory appeals, and rests on

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[3] In an opinion by then-Judge Ruth Bader Ginsburg, the District of Columbia Court Circuit *exercised* jurisdiction over an appeal challenging the denial of a fact-based summary judgment motion, although it did not expressly address the jurisdictional issue. *Martin* v. *D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir.), vacated in part and en banc rehearing granted, 817 F.2d 144, original opinion reinstated, 824 F.2d 1240 (1987). Five other Circuits — the First, Fourth, Eighth, Ninth, and Tenth — have expressly held that they have jurisdiction to entertain such interlocutory appeals. See *Unwin* v. *Campbell*, 836 F.2d 124 (1st Cir. 1988); *Caro* v. *Aponte-Roque*, 878 F.2d 1 (1st Cir. 1989); *Rogers* v. *Fair*, 902 F.2d 140 (1st Cir. 1990); *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994); *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988); *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986); *Tagstrom* v. *Enocksen*, 857 F.2d 502 (8th Cir. 1988); *Johnson-El* v. *Schoemehl*, 878 F.2d 1043 (8th Cir. 1989); *Kelly* v. *Bender*, 23 F.3d 1328 (8th Cir. 1994); *Burgess* v. *Pierce County*, 918 F.2d 104 (9th Cir. 1990); *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Austin* v. *Hamilton*, 945 F.2d 1155 (10th Cir. 1991).

distinctions that are not meaningful and cannot be sensibly applied. It should be set aside.

A. A Defendant Who Denies Violating The Law At All May Assert Qualified Immunity

1. The basic underpinning of the decision below was the court of appeals' conclusion that this case does not involve immunity *at all*. In the Seventh Circuit's view, immunity comes into play only when the official defendant maintains that the controlling law was unsettled; that court has opined that "interlocutory appeal to vindicate the [qualified immunity] right not to be tried is unavailable when there is no legal uncertainty." *Elliott*, 937 F.2d at 341. It is this "protection from legal uncertainty," the court has reasoned, that is "the genesis of doctrines of official immunity." Pet. App. 2a. This approach, however, is premised on a fundamental misconception of the immunity doctrine. Immunity does not protect only defendants who acted in the shadow of unsettled law. To the contrary, it more broadly shields from suit *all* defendants whose "conduct d[id] not violate clearly established statutory or constitutional rights" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) — a group that necessarily includes defendants who did not violate the law *at all* because they did not commit the acts alleged or because those acts were lawful.

This understanding follows directly from the rationale for qualified immunity. As the Court explained in *Harlow*, the seminal decision in the area,

> it cannot be disputed seriously that claims [against public officials] frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the

> ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

457 U.S. at 814, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand. J.), cert. denied, 339 U.S. 949 (1950). See *Digital Equipment Corp.* v. *Desktop Direct, Inc*, 114 S. Ct. 1992, 1997 (1994).

The Court elaborated on this understanding in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), explaining that "[t]he conception animating the qualified immunity doctrine as set forth in *Harlow* * * * is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."'" *Id.* at 525, quoting *Harlow*, 457 U.S. at 819, in turn quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). The Court added that

> the "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risk of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." * * * Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government."

Mitchell, 472 U.S. at 526, quoting *Harlow*, 457 U.S. at 816, 817.

These policies plainly apply with equal force to *all* unmeritorious suits against public officials, including those in which the defendant simply did not violate the law, either because the law was settled in his favor or because he did not engage in the illegal conduct alleged. After all, the fear that

an arrest or a search might lead even to a wholly baseless lawsuit (for example, a false allegation of brutality), followed by interminable and expensive discovery and then a trial, might well deter justified and desirable police action in particular cases; fear of such "harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). In the absence of immunity, this concern inevitably would effect "close decisions" where "public officials should not always err on the side of caution" (*Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)), and at the margins would mean that "talented candidates" are "deterred by the threat of damage suits from entering public service." *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1833 (1992). See *Harlow*, 457 U.S. at 819; *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240-241 (1974). Immunity therefore is necessary because "officials can act without fear of harassing litigation only if * * * unjustified lawsuits are quickly terminated." *Davis*, 468 U.S. at 195.

By the same token, "[o]ne of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson*, 483 U.S. at 646 n.6, quoting *Harlow*, 457 U.S. at 817. Again, this policy has nothing whatever to do with whether the official defendant acted under the shadow of legal uncertainty. Instead, it compels the conclusion, as *Harlow* itself put it in unambiguous terms, that all "'insubstantial' suits against high public officials should not be allowed to proceed to trial. * * * We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure." 457 U.S. at 819-820 n.6. See *id.* at 816 ("insubstantial claims should not proceed to trial"). This concern with pretrial termination of "'insubstantial claims'" was "the driving force behind *Harlow*'s substantial reformulation of qualified-immunity

principles." *Anderson*, 483 U.S. at 640 n.2. And a claim that has no legal or factual basis at all is at least as insubstantial — indeed, it seems considerably more so — than one in which the relevant law was unsettled.

It should be added that, while an immunity defense premised on the assertion that the plaintiff's claim is legally or factually insupportable may well echo the defense on the merits, there is more than a semantic distinction between the two; they differ conceptually in a fundamental respect. A defense on the merits, of course, contests ultimate monetary liability. But qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original). See *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Practical consequences attend this conceptual distinction: defendants asserting immunity have rights to a quick termination of the litigation (including limits on discovery, see *Anderson*, 483 U.S. at 646-647 n.6, and an entitlement to interlocutory appeal) that are unavailable to litigants who defend only on the merits.

2. That the qualified immunity doctrine protects officials who did not violate the law at all is dispositively established by *Siegert* v. *Gilley*, *supra*, where the plaintiff asserted that he was denied due process when the defendant defamed him after the termination of his public employment. The defendant contended both that his conduct was wholly lawful and that, if unlawful, it did not violate law that was clearly established at the time. See 500 U.S. at 229. This Court granted certiorari in the case "to clarify the analytical structure under which a claim of qualified immunity should be addressed." *Id.* at 231.

In doing so, the Court explained that

> A necessary concomitant to the determination of whether a constitutional right asserted by the plaintiff is "clearly

> established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

500 U.S. at 232. And the Court concluded that the facts of *Siegert* itself "demonstrate[d] the desirability of this approach to a claim of immunity," for the plaintiff there "failed to establish the violation of any constitutional right at all." *Id.* at 233. The Court accordingly ordered the suit dismissed. See *id.* at 234-235.

While *Siegert* holds that a suit must be dismissed on immunity grounds when it fails to state a *legal* claim, *Mitchell* and *Anderson* expressly indicate that immunity entitles the defendant to prevail when, after discovery, the plaintiff has failed to uncover *evidence* that the defendant did what he was alleged in the complaint to have done. Explaining in *Mitchell* that the immunity doctrine requires dismissal of an insubstantial claim on summary judgment, the Court declared:

> Even if the [plaintiff's] complaint adequately alleges the commission of acts that violated clearly established law, *the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.* *Harlow* thus recognized an entitlement not to stand trial or face other burdens of litigation, conditioned on the resolution of the essentially

> legal question whether the conduct of which the plaintiff complains violated clearly established law.

472 U.S. at 526 (emphasis added).[4]

The Court echoed this analysis in *Anderson*. It there observed that resolution of immunity claims often will require examination of the particular circumstances of the case, such as the information possessed by officials conducting a search. 483 U.S. at 641. Against this background, the Court concluded that if actions alleged by the plaintiff are not lawful, "and if the actions [the defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment *on qualified immunity grounds* can be resolved." 483 U.S. at 646-647 n.6 (emphasis added). The upshot is plain: the plaintiff's action must be dismissed on immunity grounds if he fails to adduce sufficient evidence that the defendant engaged in conduct that violated clearly established (or, under *Siegert*, *any*) law.

It therefore should come as no surprise that, as we stated at the outset, the Court consistently has defined immunity as protecting not only those officials who acted in the shadow of

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[4] That the Court believed summary judgment in such a factual case should rest on immunity grounds is confirmed by its further observation that "the trial judge may rule * * * that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations * * *." *Mitchell*, 472 U.S. at 527 (emphasis in original). The clear implication is that the district court's rejection of the defendant's claim of *factual* innocence involves an assertion of *immunity*.

legal uncertainty (or only those who believed their conduct proper at the time and were taken unawares by a change in the law), but *all* officials who did *not* "violate[] clearly established law." *Mitchell*, 472 U.S. at 530. See, *e.g.*, *Buckley* v. *Fitzsimmons*, 113 S. Ct. 2607, 2513 (1993); *Wyatt*, 112 S. Ct. at 1832; *Hunter* v. *Bryant*, 112 S. Ct. 534, 537 (1991); *Anderson*, 483 U.S. at 638; *Mitchell*, 472 U.S. at 517; *id.* at 537 (O'Connor, J., concurring in part); *Harlow*, 457 U.S. at 818. This conclusion that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law" (*Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)) necessarily reaches an official whose denial of wrongful conduct rests on the claim that "I didn't do it."

3. In addition, the suggestion that immunity comes into play only when the law is unsettled plainly is belied by others of this Court's decisions. In *Hunter* v. *Bryant*, for example, Secret Service agents were sued for making an arrest that assertedly was not grounded on probable cause. This Court summarily reversed the denial of their summary judgment motion. The Court held that "[t]he[] undisputed facts establish that the Secret Service agents are entitled to qualified immunity. Even if we assumed, *arguendo*, that they (*and* the magistrate [who subsequently ordered the plaintiff held without bond]) erred in concluding that probable cause existed to arrest [plaintiff], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Id.* at 537. While this may or may not have been a sort of legal ("albeit fact-specific" (*Anderson*, 483 U.S. at 641)) determination,[5] the Court made

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[5] Dissenting on the ground that the defendants had not established that a reasonable officer would have believed that probable cause existed, Justice Stevens characterized the Court's decision as engaging in "*de novo* review of a question of fact." 112 S. Ct. at 540.

no suggestion that the controlling law had been unsettled; to the contrary, it indicated that the dispositive standard was more than 25 years old. See *Hunter*, 112 S. Ct. at 537, citing *Beck* v. *Ohio*, 379 U.S. 89 (1964).

Indeed, the suggestion that legal uncertainty is the *sine qua non* of immunity is inconsistent with the decision of the court below to *itself* review an immunity claim that did not involve any assertion of legal uncertainty *in this very case*. Here, the district court denied the defendants' claim that they were entitled to immunity from the plaintiff's contention that they lacked probable cause to arrest him; while the court found no evidence supporting the claim of no probable cause, it concluded that the plaintiff might advance such evidence at trial. Pet. App. 9a-10a. The court of appeals reversed on the ground that a grant of summary judgment is mandatory when the record presents no genuine issue of material fact. Pet. App. 2a-3a. While we certainly agree with this determination, the court of appeals did not suggest — and could not have suggested — that there was any uncertainty about either the controlling legal standard or the lawfulness of the defendants' conduct.

B. An Immunity Defense Of "I Didn't Do It" May Be Raised On Interlocutory Appeal

1. The determination that petitioners have asserted an immunity defense is dispositive of the question whether they have a right to interlocutory appeal under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Mitchell*, of course, held that the denial of a qualified immunity claim *is* subject to appeal under *Cohen* because "[t]he entitlement is an *immunity from suit*." 472 U.S. at 526 (emphasis in original). And the *Cohen* doctrine provides that "the issue of appealability under § 1291 is to be determined for the *entire category* to which a claim belongs." *Digital*, 114 S. Ct. at 1996 (emphasis added). See *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("[i]n

fashioning a rule of appealability under § 1291, * * * we look to categories of cases"); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 439 (1985); *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). This means that all claims in the "immunity category" may be raised on interlocutory appeal.

Any departure from this principle in the circumstances of this case presumably would have to be grounded on the conclusion that the *particular* immunity claim here really is a "defense on the merits." *Elliott*, 937 F.2d at 341. But the Court "has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." *Richardson-Merrell*, 472 U.S. at 439. Thus, when the Court determines that a given category of claims (for example, those involving *forum non conveniens*) are not subject to interlocutory appeal because they typically involve a substantial overlap with the merits, it precludes appeal even of those *forum non conveniens* claims that would "not require significant inquiry into the facts and legal issues presented by the case." *Van Cauwenberghe*, 486 U.S. at 529. By the same token, once the Court determines that a particular category of claims (for example, those involving double jeopardy) *is* subject to interlocutory appeal, it does not preclude even those appeals within that category of claims that do require some consideration of the merits.[6] That should be the end of the matter here; having determined that qualified immunity claims may be raised on appeal, the Court should not separate out such claims involving an "I didn't do it" defense.

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[6] Some double jeopardy claims "may depend entirely on the task of determining whether the charged offense is the same as the offense charged in an earlier proceeding. This inquiry may be deeply dependent on the facts." 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, §3911.2, at 389 (1992).

While the Seventh Circuit thought this conclusion inconsistent with *Mitchell*, see *Elliott*, 937 F.2d at 342, nothing in that decision limits the right to appeal in quite the way the court of appeals supposed. To be sure, *Mitchell* focused on the claim before it, which involved the assertion that a particular rule of law had not been clearly established at the time of the defendant's conduct — an assertion that was in some measure distinct from the merits.[7] See 472 U.S. at 528 & n.9. But as we have explained (at pages 13-14, *supra*), the Court also took pains in *Mitchell* to emphasize that the defendant is entitled to summary judgment on qualified immunity grounds "if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed th[e] acts" asserted by the plaintiff. *Id.* at 526. It hardly would have made sense for the Court to do so had it meant to preclude appeals in such cases when summary judgment is denied. And *Mitchell*'s "repeated references to denial of a defendant's motion for summary judgment * * * seem to support appeal even though the only question is whether the summary judgment standard was properly applied." 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3914.10, at 653 (1992). As a consequence, as Judge Richard Arnold wrote for the Eighth Circuit, if permitting interlocutory appeals in "I didn't do it" cases "is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion." *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (8th Cir. 1986).

2. Because the court of appeals' analysis was infected by its conclusion that an immunity defense is altogether unavailable when the public official's defense is "I didn't do it," that court nowhere considered application of the *Cohen* test governing so-called collateral order appeals. While

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[7] But by no means entirely. See pages 22-23 & n.9, *infra*.

Mitchell makes application of that test to the particular facts here unnecessary, it is plain that, on examination, the requirements of *Cohen* are satisfied.

The Court concluded in *Cohen* that an order is a "final decision" for purposes of § 1291 if it is "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-547. In *Cohen*'s oft-repeated formulation, these are orders that

> finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546. As more recently restated by the Court, the *Cohen* standard is satisfied if the order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [will] be effectively unreviewable on appeal from the final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). See *Richardson-Merrell*, 472 U.S. at 431.

There can be no doubt that the first and third of these requirements are satisfied here. As the Court explained in *Mitchell*, the district court's "denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,' it is apparent that *Cohen*'s threshold requirement of a fully consummated decision is satisfied in such a case." 472 U.S. at 527, quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977). Similarly, because "[t]he entitlement is an

immunity from suit" that "is effectively lost if a case is erroneously permitted to go to trial," "the district court's decision is effectively unreviewable on appeal from a final judgment." *Id.* at 527, 526 (emphasis in original). See *Cohen*, 337 U.S. at 546 (after trial the asserted right "will have been lost, probably irreparably"). See generally *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495, 498-500 (1989); *Van Cauwenberghe*, 486 U.S. at 523.

3. a. The remaining *Cohen* standard also is satisfied here: the determination to be made on appeal in this case is separable from the merits. The question whether a genuine issue of material fact exists regarding particular issues in the case — the question to be resolved on interlocutory review — plainly is distinct from the question for trial, which is whether the defendants *actually* committed the acts alleged. Again, as Judge Arnold wrote for the Eighth Circuit,

> the issue is, on close analysis, separable from the merits. To put it in terms of the present case, the issue is not whether the defendant [committed the alleged act] in fact, but, rather, whether, when all the facts are viewed in the light most favorable to the plaintiff, there is any genuine issue, triable to a jury, of improper [action].

Wright, 800 F.2d at 203.[8] And this legal issue is not one that survives the trial, since a court of appeals "will not review a claim by a losing defendant that, even though there

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[8] See also *Kelly* v. *Bender*, 23 F.3d 1328, 1330 (8th Cir. 1994) "[w]e have jurisdiction over this appeal because, although largely fact-based, it presents the legal question of whether [plaintiff] raised a genuine issue of material fact regarding whether the [defendants'] conduct violated his clearly established rights"); *Burgess* v. *Pierce County*, 918 F.2d 104, 106 (9th Cir. 1990) ("the question of immunity is conceptually divisible from plaintiff's claim on the merits, since it is the legal question of whether there are genuine issues for the jury").

is a jury verdict against him supported by adequate evidence, the district court prior to trial (when the written record was sparser and harder to understand) should have granted summary judgment in his favor." *Unwin* v. *Campbell*, 863 F.2d 124, 139 (1st Cir. 1988) (Breyer, J., dissenting).

This conclusion draws considerable support from the decisions of this Court that dismissed appeals on grounds of lack of separability. Those decisions have tended to emphasize that resolution of the issue raised on interlocutory appeal would have required an analysis of the likely outcome of the trial, an assessment of "a full trial record," or an examination of proof to be offered at trial. C. Wright, A. Miller, & E. Cooper, *supra*, § 3911.2, at 384. See, *e.g.*, *Richardson-Merrell*, 472 U.S. at 439 (must assess the effect of the "ruling on the final judgment" or "the likely course of the trial"); *Van Cauwenberghe*, 486 U.S. at 528 (must consider "what proof is required" at trial). Compare *Mitchell*, 472 U.S. at 529-530 n.10. In contrast, resolution of a summary judgment motion and subsequent appeal does not require any prediction regarding the course or outcome of the trial.

This understanding also accords with the purposes of the separability requirement. Separability "helps protect against repetitive consideration of the same matters by the court of appeals" and "helps improve the quality of judicial review — if the matter is one whose decision is 'affected by' decision on the merits, review before trial on the merits might reach a result that would not be accepted on later appeal." 15A C. Wright, A. Miller, & E. Cooper, *supra*, § 3911, at 333. See *id.* § 3911.2, at 379-380; *Van Cauwenberghe*, 486 U.S. at 527-528. But review of the summary judgment record with an eye towards identifying issues of fact that need *later* resolution has only the most general overlap with a subsequent review of the verdict after trial; the same record is not being reviewed twice, and (as noted above) the court of appeals' determination regarding the existence of genuine

issues cannot be inconsistently revisited (or revisited at all) at a later date.

b. To say this, of course, is nevertheless to acknowledge that there is *some* degree of overlap between the immunity determination and the merits; a reviewing court must familiarize itself with the plaintiff's legal allegations and with some of the sorts of evidence that might be advanced at trial. But at least in the immunity context, the Court has expressly rejected the argument that this type of "factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell*, 472 U.S. at 529 n.10. The Court thus "has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing Court must consider the plaintiff's factual allegations in resolving the immunity issue." *Id.* at 528-529. See *id.* at 528 (resolution of appellate issues "will entail consideration of the factual allegations that make up the plaintiff's claim for relief").

It hardly could be otherwise, for review of an immunity claim *always* will entail substantial overlap with the merits, at least in the narrow sense that familiarity with the legal allegations and the pretrial record will be necessary. When the immunity claim is that the law was not clearly established, the court will have to review both the legal theory of the complaint and the law stating the relevant legal standard; when the defendant maintains that his conduct did not violate the law (or did not violate clearly established law), the court will have to review the factual record. That much is clear from this Court's decisions, which have evaluated immunity claims — *on interlocutory appeal* — by examining the defendant officials' challenged conduct (see, *e.g.*, *Hunter*, 112 S. Ct. at 537) or the plaintiff's factual allegations and legal theory (see, *e.g.*, *Siegert*, 500 U.S. at 233-235) in

considerable detail. No Justice has suggested that the Court lacked jurisdiction to entertain these claims.[9]

c. The Court has found these appeals to satisfy the *Cohen* test because, whatever the factual overlap between the interlocutory appeal issue and the merits, "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is *conceptually distinct* from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-528 (emphasis added). The Court has applied this "conceptual distinctness measure of separability" (15A C. Wright, A. Miller, & C. Cooper, *supra*, § 3911.2, at 388) where "'the essence' of the claimed

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[9] As Professors Wright, Miller, and Cooper have observed:

> Since decision of the appeal will require a close appraisal of the facts, whether those alleged or those that need be sorted out from a summary judgment record and found worthy of being assumed, this form of separability does not rest on the prospect that the court of appeals will avoid the risk of refamiliarization with the facts on a subsequent appeal. The only thing that can be said with confidence is that appraisal of the facts is likely to be more curtailed than on appeal from a final judgment.

15A C. Wright, A. Miller, & E. Cooper, *supra*, § 3911.2, at 387. They added:

> there can be no dispute that the legal question on appeal, whether a given set of assumed facts involves violation of a clearly established legal norm, is manifestly tied to those facts. Denial of the claim of immunity on those facts often will be followed by further proceedings that establish a different factual predicate for decision, and an ensuing appeal that requires a second survey of essentially the same terrain.

Id. at 388.

right [to appeal] is a right not to stand trial" (*Van Cauwenberghe*, 486 U.S. at 524) that is expressly grounded in the Constitution or a statute, or has "a good pedigree in public law." *Digital*, 114 S. Ct. at 2000. The Court consistently has permitted interlocutory appeals in such cases under *Cohen*. See *Abney* v. *United States*, 431 U.S. 651, 659, 661 (1977); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979).

This approach, which permits interlocutory appeals when an important and *bona fide* right not to be tried is at stake, is not a departure either from *Cohen* or from the rule of finality. "[A]s Mr. Justice Jackson, the author of *Cohen* later pointed out: '[I]t is a final *decision* that Congress has made reviewable. ... While a final judgment is always a final decision, there are instances in which a final decision is not a final judgment.'" *Abney*, 431 U.S. at 658, quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.). And because the Court has frankly recognized that "it is impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality," it has "held that the requirement of finality is to be given a 'practical rather than a technical construction.'" *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964), quoting *Cohen*, 337 U.S. at 546. See *Abney*, 431 U.S. at 658.

Against this background, the Court has explained that classes of interlocutory district court rulings must be treated as final "decisions" even though they do not terminate the litigation because doing so is necessary to serve the interest of "'achieving a healthy legal system'" and "efficient administration of justice in the federal courts" (*Digital*, 114 S. Ct. at 1995, 1996) -- the ultimate goals of the finality rule. With these considerations in mind, "[t]he greater the risk that an important matter may evade review, and particularly the greater the risk of hardship if present review is denied, the less strict is the insistence on separability." 15A C. Wright,

A. Miller, & E. Cooper, *supra*, § 3911.2, at 379. See *id.*, § 3911, at 335-336. And when denial of immediate appeal "would result in irreparable injury" (*Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 441 (1956) (opinion of Frankfurter, J., joined by Harlan, J.)) by destroying a right not to stand trial, the "right affected by the ruling can and should be protected by appeal prior to judgment." *Richardson-Merrell*, 472 U.S. at 436.

It may be added that rejection of the Seventh Circuit's rule will not have adverse effects on "efficient judicial administration." *Richardson-Merrell*, 472 U.S. at 430. It will not materially increase the number of interlocutory appeals because most courts to have addressed the issue now permit interlocutory challenges to the denial of summary judgment motions such as the one in this case. See note 3, *supra*. While the Court has expressed the concern that too-ready a recourse to the *Cohen* doctrine would have the finality rule "swallowed by ever-multiplying exceptions" (*United States* v. *Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 270 (1982) (per curiam)), that is not a danger here; any rule announced in this case will be limited to immunity appeals, which the Court *already* has held to fall under *Cohen*. And this is not a situation "'where the result of review will be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of [the] litigation."' *Stack*, 342 U.S. at 12 (opinion of Jackson, J.), quoting *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940). Official immunity is not a routine claim that "happen[s]" to arise in the course of a lawsuit; it is a safeguard that the Court has recognized as essential to the healthy functioning of the polity.

C. The Court Of Appeals' Rule Cannot Be Meaningfully Applied

The Seventh Circuit's approach thus finds no support in *Mitchell*, in the *Cohen* doctrine, or in the law of immunity.

But there is more wrong with it than that: the court of appeals' conclusion relies on conceptual distinctions that ultimately are not meaningful and cannot be sensibly drawn in practice.

1. At the outset, the Seventh Circuit's insistence that "legal uncertainty" is the indispensable component of an immunity claim (*Elliott*, 937 F.2d at 343) will lead to perverse results. We know from *Anderson* and *Mitchell* that the immunity inquiry must look to the particular conduct engaged in by the defendant. See 483 U.S. at 641; 472 U.S. at 526-527. Thus, as the First Circuit has observed, "[u]nder *Anderson*, the proper inquiry must take into account how th[e] general right [asserted by the plaintiff] applies to the particular facts, including a public official's actual conduct." *Unwin*, 863 F.2d at 131.[10] A district court therefore must determine whether what the defendant *actually did* violated clearly established law.

This being so,

> it would make no sense to hold that while a district court must look beyond the complaint, the court of appeals may not. After *Anderson*, a district court is required to examine whether facts gathered through discovery (including facts concerning a defendant's conduct) create a genuine issue of fact regarding the issue of qualified immunity. A court of appeals, on interlocutory review

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[10] As the First Circuit explained (*Unwin*, 863 F.2d at 131), the passage in *Anderson* noting that discovery may be necessary prior to resolution of a qualified immunity summary judgment motion (483 U.S. at 646-647 n.6) cited to *Mitchell*, 472 U.S. at 526, which states that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts."

> of such a lower court decision, cannot confine itself to just the allegations in the complaint.

Unwin, 863 F.2d at 132. The Seventh Circuit itself acknowledged this very point (see *Elliott*, 937 F.2d at 342), noting that every Circuit has rejected the rule of *Bonitz* v. *Fair*, 804 F.2d 164 (1st Cir. 1986), overruled by *Unwin*, 863 F.2d at 130-133, which had held that the courts of appeals could not look beyond the allegations of the complaint in reviewing the denial of motions seeking summary judgment on immunity grounds. Instead, courts of appeals must examine the entire summary judgment record.

So, for example, if a plaintiff alleges that the defendant engaged in a particular act (say, that he violated the Fourth Amendment because he seized contraband that was not in plain view) and the defendant responds that he engaged in different conduct altogether (say, that he seized the contraband because it *was* in fact in plain view), the court will have to determine whether the plaintiff's version is supported by the record before determining whether the defendant's conduct was inconsistent with clearly established law. If the plaintiff's evidence does not raise a genuine issue of material fact regarding the defendant's story, the court will have to determine whether the conduct *as described by the defendant* violated clearly settled law. And there is no doubt that appeal would lie if the legality of the defendant's conduct had been unclear (if, for example, the scope of the plain view doctrine had been unsettled), because the question then would be whether the defendant had "acted in the shadow of legal uncertainty." *Elliott*, 937 F.2d at 342.

In that light, it makes no sense at all to deny the defendant an appeal because it was clear that his conduct was *legal*. "To afford the * * * defendant[] immunity only if the law had been a little less favorable to [him] would seem ridiculous." *Unwin*, 863 F.2d at 133 n.9. But that is the upshot of the Seventh Circuit's approach: if the legality of

seizing contraband that was in plain view had been clear (as it was clear here that it was legal *not* to beat a suspect during an arrest), appeal would not lie. If there had been some uncertainty about the scope of the plain view doctrine, however, the court would have jurisdiction to entertain the appeal. This outcome may charitably be termed peculiar.

The Seventh Circuit's rule, moreover, will lead to bizarre results in a host of everyday situations. Imagine a case like *Hunter*, for example, in which the plaintiff asserts that the defendant law enforcement officers had no probable cause to arrest him. The defendants move for summary judgment, asserting that plaintiff was arrested because he was brandishing a gun; they assert that the arrest was lawful and that, if it was not, the law was unsettled on whether the plaintiff's action gave them probable cause to arrest. For his part, the plaintiff asserts that he had no gun at all. The district court denies the summary judgment motion. On interlocutory appeal, the appellate court finds that there is no evidence supporting (and therefore no genuine issue of material fact regarding) the plaintiff's assertion that he did not have a gun — and it further finds that *clearly settled* law at the time of the incident established (and established with crystal clarity) that police officers *did* have probable cause to make an arrest when the suspect was brandishing a gun. This determination establishes that there had been no legal uncertainty at the time of the arrest. And because the Seventh Circuit holds that jurisdiction exists only when the defendant acted in the shadow of legal uncertainty, its rule would seem to require that the appeal be dismissed. Having found that the defendant did nothing wrong, the court nevertheless would have to remand the case for trial.

The preposterous case just hypothesized is essentially the one involved here: under petitioners' version of the facts it is plain that they did nothing wrong. The only difference between the cases is that here the defendants failed to *argue* that there had been any uncertainty in the state of the law. If

that manipulable consideration is dispositive, however, the doctrine of *Harlow* "would be transformed from a guarantee of immunity into a rule of pleading." *Anderson*, 483 U.S. at 639.[11] This makes clear, we submit, that the Seventh Circuit's rule must fall of its own weight.

Indeed, the Seventh Circuit in *Elliott* (937 F.2d at 341) itself recognized the slipperiness of its distinction. The court opined in that case, which involved a claim that the plaintiff was beaten by police when taken into custody, that

> [b]y sleight of hand you can turn any defense on the merits into a defense of qualified immunity. Consider this possibility for the police officers Elliott has sued: It was not "clearly established" in May 1986, when we arrested Elliott, that police officers could be liable for taking peaceable custody of a suspect; the district court proposes to hold a trial at which the only outcome favorable to plaintiff (given the uncontroverted evidence that Elliott suffered no injury) would be a holding that police *are* liable for making arrests that cause no injury; that would be a change of law, which we cannot be expected to forecast; therefore we are entitled to qualified immunity. The parenthetical expression carries the entire weight of this "argument": if you allow the possibility

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[11] It is no answer to this point to say that petitioners here could not reasonably have been in doubt about the lawfulness of their conduct if (as they say) they simply took a suspect into custody. Appeals would become impossibly cumbersome (as well as wholly removed from the purposes of the immunity doctrine) if jurisdiction turned on whether law that was in fact clearly settled in the defendant's favor could reasonably have been thought unclear. And it would be possible to rephrase any defense (except, perhaps, one of mistaken identity) in terms that suggest legal uncertainty; here, for example, petitioners could have contended that the law was unclear on how much force may be exerted against suspects who resist arrest.

> that the suspect will show injury at trial, then the defendants may be held liable under the law as it existed in 1986. So the claim to immediate appellate review collapses to the argument that the "right not to be tried" can be vindicated only if the court of appeals combs through the factual record.

The flaw in this analysis is that the Seventh Circuit's reasoning itself collapses once it is recognized that courts of appeals may — and, indeed, must — "comb through the factual record" when the plaintiff and defendant present varying versions of the relevant events. As we have explained, that is the plain import of *Mitchell* and *Anderson*. Moreover, the Court more recently saw "little basis for drawing * * * a line" between "cases in which the determination of * * * immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993), citing *Mitchell*, 472 U.S. at 529-530 & n.10.[12] And at the risk of belaboring the point, we note again that nothing in the purposes of the immunity doctrine is served by permitting courts of appeals to review the record in this manner only when the claim of immunity is grounded on an assertion that the law is unclear.

As the leading commentators in the field have put it, while "[t]he task of appellate decision would be simplified" if "[i]mmunity appeals * * * could be limited to cases presenting neat abstract issues of law,"

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[12] Similarly, in *Harlow* summary judgment had been denied because genuine issues of material fact existed (see 457 U.S. at 805-806); the Court declined a request that it resolve the summary judgment dispute not because it lacked jurisdiction, but because the trial court was more familiar with the record. *Id.* at 819-820. See also *Malley*, 475 U.S. at 350 (opinion of Powell, J., joined by Rehnquist, J.).

> it is difficult to find anything in the *Mitchell* decision that explains why these benefits offset the costs to official defendants. The burdens of proceeding through pretrial preparation and trial are if anything likely to be greater when the dispute turns primarily on fact disputes than when it turns primarily on issues of law. Public officials will be distracted from the responsibilities of office, and people contemplating appointment to public office may fear fact-based litigation as much as law-disputed litigation. * * * The logic of permitting appeals on legal issues is difficult to distinguish from the logic of permitting appeals on fact issues.

15A C. Wright, A. Miller, & E. Cooper, *supra*, § 3914.10, at 664 (emphasis added). Professors Wright, Miller, and Cooper therefore concluded that a rule "that appealability should not depend on the 'factualness' of the issues presented" "deserves general adoption." *Ibid.*

2. It should be added that, for similar reasons, the Seventh Circuit was wrong in reasoning that a defense that the defendant did not commit the acts alleged by the plaintiff raises factual issues that do not qualify for interlocutory appeal under *Mitchell*'s holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." 472 U.S. at 530. When there is no genuine issue of material fact, the defendant's entitlement to summary judgment *is* an issue of law under Fed. R. Civ. P. 56. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This principle applies to motions for summary judgment based on qualified immunity just as much as it does to other summary judgment motions. See, *e.g.*, *Wright*, 800 F.2d at 203; *Martin*, 812 F.2d at 1434. Of course, the question on such a motion is, as then-Judge Breyer observed, a "fact-specific

legal question." *Unwin*, 863 F.2d at 138 (Breyer, J., dissenting). But under *Anderson* a court always will have to resolve such fact-specific preliminary disputes on its way to resolving the ultimate question "whether the defendant's *specific* conduct in his *specific* situation was, or was not, clearly prohibited by law" (*id.* at 1390); as we have noted, the court will have to determine what the defendant actually did (insofar as that can be done at the summary judgment stage) before it is able to determine the legality (or clear illegality) of that conduct. Of course, the answer to the ultimate question will be easy when (as here) the defendant's conduct was permitted by law.

3. Finally, the policies underlying this Court's qualified immunity decisions would be thwarted by a rule precluding immediate appeal from the denial of a summary judgment motion, made after discovery, premised on the defense that the defendant did not commit the acts alleged by the plaintiff. Again, it bears emphasis that one of the primary purposes of qualified immunity is to permit "the dismissal of insubstantial lawsuits without trial." *Harlow*, 457 U.S. at 814. "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation * * * only if unjustified lawsuits are quickly terminated." *Davis*, 468 U.S. at 195. As a consequence, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 112 S. Ct. at 536. And "absent immediate appeal, the central benefits of qualified immunity — avoiding the costs and general consequences of subjecting public officials to the risk of discovery and trial — would be forfeited." *Puerto Rico Aqueduct Authority*, 113 S. Ct. at 687. See *Wright*, 800 F.2d at 203.[13] "The

[13] A governmental defendant's right not to stand trial is just as effectively lost if the court of appeals does not entertain an appeal from a legally erroneous denial of summary judgment, as here, as it is if the district court declines to rule on the summary

importance of this consideration hardly need emphasis." *Harlow*, 457 U.S. at 814 n.23.

The contrary rule announced by the Seventh Circuit, if allowed to stand, would have significant practical consequences. Cases like *Mitchell*, in which the constitutionality of the defendant's actions is genuinely unsettled at the time he acts, are relatively rare. More common are cases involving factually insupportable accusations by disgruntled plaintiffs, such as the allegations by respondent here. As this Court recognized in *Anderson*, *Mitchell*, *Davis*, and *Harlow*, such cases, if not expeditiously terminated, pose a substantial danger of chilling public officials in the legitimate exercise of their governmental duties. Yet it is appeals from precisely this class of cases that the court below has refused to entertain. This is a perverse result, for it forces the victims of the most insubstantial claims to go through trial. The extraordinary damage caused by such a rule explains why 45 States, the International City/County Management Association, the National Institute of Municipal Law Officers, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the District of Columbia, the Commonwealth of Puerto Rico, and the Territory of Guam have filed as *amici* in support of petitioners.

Moreover, as a matter of policy an official who did nothing even arguably wrong is at least as deserving of the interlocutory appeal authorized by *Mitchell* as is an official whose conduct was arguably, but not clearly, unconstitutional at the time he acted. And where the plaintiff cannot adduce any evidence establishing that the official committed the acts alleged, a motion for summary judgment should be granted, or the appeal of its denial allowed, to further the policy served by *Mitchell* of sparing the official and the courts the

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judgment motion in the first place. *Unwin*, 863 F.2d at 132.

time and expense of a trial, the result of which is a foregone conclusion. "[T]he purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury." *Slattery* v. *Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J., sitting by designation) (citing *Mitchell*, 472 U.S. at 526).

In addition, the decision below does more than burden public officials; it also creates a complex rule that will, in practice, be extraordinarily difficult to apply. It often will be unclear whether the defendant genuinely "acted in the shadow of legal uncertainty" (*Elliott*, 937 F.2d at 342), and thus has a proper appeal, or merely "ma[d]e * * * a stab at presenting a legal issue" (*ibid.*), and therefore does not. Since qualified immunity is a highly fact-specific inquiry (see *Anderson*, 483 U.S. at 641), and there is usually some dispute (whether material or not) about the facts, the parties and the court often will have to devote considerable effort to determining whether the defendant really is arguing (and is arguing legitimately) that there were doubts about the controlling law. While this Court "has expressly rejected efforts to reduce the finality requirement of [28 U.S.C.] § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal" (*Richardson-Merrell*, 472 U.S. at 439), such a determination will be required for qualified immunity appeals after this decision.

In sum, the decision below will have perverse and destructive consequences. It will substantially reduce the efficacy of qualified immunity as a protection for diligent and conscientious public officials. And it will create enormous problems of judicial administration that greatly outweigh any benefit that would follow from a reduction in the number of interlocutory appeals. That decision should be reversed by this Court.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
30 North LaSalle Street
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
MYLES R. HANSEN
GARY A. ORSEK
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 778-0616

**Counsel of Record*

FEBRUARY 1995